DOCKET

(1)

PROCEEDINGS AND ORDERS

DATE: 050385

CASE NBR 84-1-05814 CFX
SHORT TITLE Diggs, Charles
VERSUS Lyons, Supt., et al.

DOCKETED: Nov 28 1984

Date	Proceedings and Orders
Nov 28 1984	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Jan 2 1985	Waiver of right of respondent Lyons, Supt., et al. to respond filed.
Jan 17 1985	DISTRIBUTED. February 15, 1985
Feb 12 1985	Response requested.
Mar 14 1985	Brief of respondents Lyons, Supt., et al. in opposition filed.
Mar 21 1985	REDISTRIBUTED. April 12, 1985
Apr 15 1985	REDISTRIBUTED. April 19, 1985
Apr 22 1985	REDISTRIBUTED. April 26, 1985
Apr 29 1985	Petition DENIED. Dissenting opinion by Justice White with whom Justice Brennan and Justice Marshall join. (Detached opinion.)

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MJP

PETITION FOR WRIT OF CERTIORARI

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-5814 (2)

CHARLES DIGGS, Petitioner

v.

EDMOND LYONS, et al.,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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November 26, 1984

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Citations

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CHARLES DIGGS, Petitioner

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PETITION FOR WRIT OF CERTIORARI
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FOR THE THIRD CIRCUIT

Petitioner Charles Diggs respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on July 30, 1984.

Opinion Below

The opinions of the Court of Appeals and the Eastern District of Pennsylvania, not yet reported, appear in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on July 30, 1984. A timely petition for rehearing en banc was denied on August 30, 1984, and this petition for

certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether, pursuant to the Federal Rules of Evidence, evidence of conviction of all crimes punishable by imprisonment in excess of one year is always admissible in all civil cases concerning the credibility of any witness, regardless of its probative value, relationship to the issues in the case, or possible prejudice--except where there is prejudice to a civil defendant?

2. Whether the civil disability imposed on persons convicted of crimes by the Federal Rules of Evidence, if so interpreted, violates the bill of attainder, ex post facto, due process and equal protection provisions of the Constitution of the United States?

Federal Rules of Evidence Involved

Rule 609(a):

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Rule 403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the

issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Statement of the Case

Petitioner Diggs brought a prisoner's rights action pursuant to 42 U.S.C. §1983 alleging excessive use of force and denial of access to legal assistance. At trial, the district court permitted defendants' counsel to prove that petitioner had beeen convicted of murder, bank robbery, attempted prison escape and conspiracy within ten years of the trial. The district judge ruled that he was required to admit this evidence without balancing or discretion by Rule 609(a), which provides for balancing only in the event of "prejudice to the defendant," and that Rule 403, which establishes a balancing test for possibly prejudicial evidence, could not be used to override Rule 609(a).

The court of appeals, with one judge dissenting, affirmed, holding that in civil (as well as criminal) cases admission of such evidence is mandatory unless it prejudices the civil defendant. The majority adopted different evidentiary standards for civil plaintiffs and defendants, with the mandatory rule applied regardless of the possible prejudice to plaintiffs, recognizing that its ruling would "produce unjust and even bizarre results." Court of Appeals Slip Opinion, at 11.

Reasons for Granting the Writ

1. The Decision Below Directly Conflicts With The Decisions Of Two Other Circuits, And It Will Promote Arbitrariness, Confusion, Diversion from the Merits and Undue Prejudice in Federal Civil Litigation.

The decision of the court of appeals directly conflicts with decisions of the Fifth and Eighth Circuits. Czajka v. Hickman, 703 F.2d 317 (8th Cir. 1983); Shows v. M/V Red Eagle, 695 F.2d 114 (5th Cir. 1983). See also Redtke v. Cessna Aircraft Co. 707 F.2d 999 (8th Cir. 1983) (reaffirming Czajka); Furtado v. Bishop, 604 F.2d 80 (1st Cir. 1979) (declining to resolve possible application of Rule 403); Moore v. Volkswagenwerk, A.G., 575 F.Supp. 919 (D.C.Md. 1983); Tussel v. Witco Chemical Corp., 555 F.Supp. 979 (W.D.Pa. 1983).

Rule 609(a) of the Federal Rules of Evidence establishes different rules for three categories of crimes: as to crimes involving dishonesty or false statement, the evidence is always admissible; as to other crimes punishable by imprisonment for one year or less, it is never admissible; and as to other crimes punishable by imprisonment for more than one year, there is a balancing test that weighs probative value against prejudice. These distinctions surely make sense, since crimes involving dishonesty or false statement are clearly relevant and important to credibility, while other crimes may not be, particularly when compared to the prejudice the evidence may engender.

However, the Rule poses a dilemma that sticks out like a sore thumb: it seems to say that the only prejudice that can be considered is prejudice "to the defendant." One could understand this limit if the rule were applicable only to criminal cases. It does not address the question of applicability to civil cases, but there is no sensible basis for favoring civil defendants over civil plaintiffs, and nothing in the legislative history, even as it was interpreted by the majority in the court of appeals, supports such a notion. Yet, a literal interpretation that applies the rule to civil cases would require that the evidence is always admissible concerning the credibility of civil plaintiffs and all non-party witnesses for plaintiffs but only admissible concerning the credibility of civil defendants or their witnesses if its probative value outweighs its prejudice to the defendant.

This appears to be precisely the position adopted by the majority in the court of appeals. Thus, the majority said:

> [W]e are satisfied that it was the congressional intent that except in cases of possible prejudice to the defendant, judges were to have no more discretion in admitting evidence of felony convictions than evidence of crimen falsi and that no distinction in this regard could be made between civil and criminal cases. Court of Appeals Slip Opinion, at 10 (emphasis added).

The district court held that "only prejudice to a criminal defendant could be considered in excluding evidence of felonies." District Court Opinion, at 7 (emphasis added). This makes even less sense, since in a civil case there is no criminal defendant to

be prejudiced.[1]

However, no version of the literal interpretation adequately explains the limit "to the defendant," makes sense, or avoids arbitrariness and injustice. This has been the virtually unanimous opinion of commentators on the Rule: Rule 609 "is deficient, in that it cannot be sensibly applied in civil cases," J. Moore, 10 Moore's Federal Practice §609.14[4], at VI-148 (1982), and "a civil or criminal defendant will have greater rights to introduce this kind of evidence than his opponent . . . . while this may have some justification in the criminal context, it is strange indeed in the civil," P. Rothstein, Understanding the New Federal Rules of Evidence 655 (Supp. 1975).

Following the usual course when a legislative enactment does not make sense--particularly when, if read literally, it will "produce unjust and even bizarre results" and extend and confuse litigation--the dissenting judge in the court of appeals, and two other circuits, looked to the legislative history for an understanding of how the language came to pose this dilemma and how a court might construe it to implement the intent of the legislature and avoid the dilemma.

They found a congressional preoccupation with the issue of use of prior convictions against criminal defendants and an oversight regarding the Rule's application and effects in civil

---

[1]It makes sense if Congress was only considering the rule as it would apply in criminal cases (and thus used "defendant" rather than "criminal defendant"), but this would lead to the conclusion that the Rule should not be applied to civil cases.

cases:

> The snippets of legislative history [emphasized by the majority] in which four Members of Congress anticipated that some court might reach so ridiculous a result, 120 Cong. Rec. 2377, 2379, 2381, do not persuade me that the result was intended by Congress. The overwhelming weight of the background material on Rule 609 suggests a preoccupation by Senator McClellan and others with defendants in criminal proceedings. The result was, in my view, a legislative oversight as to the legislation's effect upon civil plaintiffs. By the time the oversight was recognized by Congressmen Dennis, Hogan, Wiggins and Lott legislative fatigue had set in, and the resulting ambiguity in Rules 403 and 609(a) was left unresolved. Court of Appeals Slip Opinion, at 13.

This preoccupation and oversight are quite clear if one reads the legislative materials for an understanding of what Congress really meant and did, rather than looking for infrequent and ignored comments that show that some members realized what was occurring.

It also explains the dilemma posed by the language and provides a clear basis for making sense of the Rule: Congress intended a balancing test as to use of evidence of crimes punishable by more than a year concerning the credibility of criminal defendants; if it had managed to focus on use of such evidence in civil cases and decided to allow such use, the Rule would probably have specified something like "prejudice to a civil party or a criminal defendant" rather than "prejudice to the defendant." The dilemma was caused by Congress' preoccupation with criminal cases (where "to the defendant" makes sense); Congress simply never managed to turn its attention to the civil application.

This understanding of the legislative history and the

language of Rule 609 has led to two reasonable interpretations: the Rule is not applicable in civil cases, or in civil cases it is subject to the balancing test of Rule 403. Every other court that has ruled on the issue (all supra)--including two other circuits--has reached the opposite conclusion from the court of appeals in this case based on one or both of these grounds.

There is simply no reason to accept an interpretation that does not make sense and would "produce unjust and even bizarre results." Indeed, Congress has directed courts to avoid such interpretations of the Federal Rules of Evidence:

> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that truth may be ascertained and proceedings justly determined. Rule 102, Federal Rules of Evidence.

Moreover, the "unjust and even bizarre results" referred to by the majority in the court of appeals should have been analyzed and understood more specifically and concretely before the court even reluctantly accepted them.

Evidence of criminal convictions that are wholly unrelated to the events and conduct at issue and that have little or no probative value will be regularly admitted in civil cases concerning the credibility of all witnesses without balancing or discretion (unless there is prejudice to civil defendants). The prejudice will, of course, be great. For example, juries will have some reluctance to award damages to plaintiffs who are perceived as "criminals", though they may be entirely faultless or even random victims in the particular case at issue, and the amounts of damages

awarded would likely be affected. If civil defendants are not excepted, juries will tend to find them liable and/or increase the damages awarded because they are perceived as "criminals". As to other witnesses, credibility will often be unduly damaged and the outcome unduly and unfairly affected by evidence of convictions even though the probative value is small and/or the prejudice is great.

Further, the attention of the jury, the court, and the parties will be diverted from the issues in the case. The party who is potentially prejudiced by the evidence will usually insist on the opportunity to counter or mitigate its effects, which will further divert trials into often complicated collateral issues. Straightforward liability and damages cases will become drawn out inquiries into, for example, unrelated fistfights of a witness that occurred many years prior to trial. Trials will be unecessarily complicated, confused and delayed; and these effects will likely be felt in a large number of cases.

2. The Federal Rules of Evidence, as Interpreted by the Court of Appeals, Impose a Civil Disability on Persons Convicted of Crimes in Violation of the Bill of Attainder, Ex Post Facto, Due Process and Equal Protection Provisions of the Constitution of the United States.

The majority in the court of appeals seemed to ignore the punitive effect of its interpretation, the civil disability it imposed on people convicted of crimes, and the constitutional issues it raises. Rule 609(a), as interpreted by the majority, imposes punishment on civil litigants and witnesses without a

hearing or individual consideration and has the disturbing look of a bill of attainder or ex post facto law. Historically, commonfeatures of bills of attainder were their imposition of civil disability and their use against individuals and groups that were publicly ostracized and scorned. The attainted (if he was not executed), and sometimes all his heirs, were forbidden to inherit, to bring suit or to testify in court. See L. Tribe, American Constitutional Law 484-99 (1978); Z. Chafee, Three Human Rights in the Constitution of 1787 (1956); 4 Blackstone, Commentaries *381. While this case involves a lesser form of civil disability, this Court has held that punishment is to be broadly viewed for purposes of the bill of attainder clauses. United States v. Brown, 381 U.S. 437 (1965). See also United States v. Lovett, 328 U.S. 303 (1946); Cummings v. Missouri, 71 U.S. 277 (1866).

It is also reminiscent of the kind of legislation that Justice Stone had in mind in his famous footnote in United States v. Carolene Products Co., 304 U.S. 144, 152n.4 (1938):

> Discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Finally, the majority in the court of appeals has disturbed the long-established even handedness of the civil law toward plaintiffs and defendants without any rational basis, in violation of equal protection and due process of law.

Conclusion

For these reasons, a writ of certiorari should issue to

review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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November 26, 1984

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1803

CHARLES DIGGS, MARVON MERRITT, WILLIAM STOVALL and LEROY EDNEY

v.

SUPERINTENDENT EDMOND LYONS, WARDEN DAVID OWENS DEPUTY WARDEN DAUGHN, SERGEANT DUNLEVEY, CORRECTION OFFICERS WILEY, MARLOWE, UPSHUR, VASQUEZ, BOZACK, WIDDOP and all unknown correctional officers

CHARLES DIGGS, WILLIAM STOVALL and LEROY EDNEY,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(Civil Action No. 80-1140)

Submitted under Third Circuit Rule 12(6)
May 14, 1984

Before: GIBBONS, GARTH and MARIS, *Circuit Judges*

(Opinion filed July 30, 1984)

Charles Diggs,
Appellant pro se

Barbara W. Mather
City Solicitor of Philadelphia
Barbara R. Axelrod
Deputy City Solicitor
Ralph J. Luongo
Assistant City Solicitor
Attorneys for Appellees

OPINION OF THE COURT

MARIS, *Circuit Judge*.

The plaintiffs, Charles Diggs, Marvin Merritt, William Stovall and Leroy Edney, brought suit in the district court under 42 U.S.C. § 1983 alleging unconstitutional use of excessive force by the defendants in preventing their escape from Holmesburg county prison in Philadelphia and denial of access to legal assistance. At the close of the plaintiffs' case the trial judge directed a verdict in favor of all the defendants on the access to legal assistance claim and in favor of defendants Lyons, Owens and Daughn on the excessive use of force claim. The trial then proceeded and at the close the jury returned a verdict in favor of the remaining defendants on the excessive use of force claim. Plaintiffs Diggs, Stovall and Edney then made a timely motion for judgment n.o.v. or for a new trial. The motion was denied by the district court and the three plaintiffs filed a notice of appeal from that denial within five days thereafter.

Our court has jurisdiction of the appeal. While technically it was taken from the denial of plaintiffs' motion for judgment n.o.v. and a new trial, the plaintiffs' motion was timely filed after the entry of the original judgment and the notice of appeal was timely filed after the denial of that motion. We therefore consider the appeal as taken from the final judgment. *Jackman v. Military Publications, Inc.*, 350 F.2d 383

(3d Cir. 1965). Two of the appellants, Stovall and Edney, have failed, however, to file briefs or otherwise prosecute the appeal and the appellees' motion to dismiss the appeal as to them will be granted. Appellant Diggs, however, has prosecuted the appeal and we accordingly proceed to consider its merits.

Appellant Diggs argues that there was insufficient evidence to support the verdict and that it was therefore error for the trial judge to deny him judgment n.o.v. Our review of the evidence satisfies us, however, that it was sufficient to support the verdict and that judgment n.o.v. was properly denied. Appellant Diggs also urges that the trial judge committed errors which require a new trial and that the court therefore committed error in denying his motion to that end. One of the alleged errors was as to the trial judge's instruction to the jury as to the amount of force a correctional officer may use to prevent a prisoner's escape from custody. As to this we need only say that we have considered the instruction and are satisfied that, taken as a whole, it correctly stated the law.

There remains for consideration appellant Diggs' other alleged ground for a new trial. This is that the trial judge erred in admitting evidence of plaintiff's prior criminal convictions for impeachment purposes. Over objection by Diggs' counsel, the trial judge permitted counsel for the defendants to prove on cross-examination of him that he had been convicted within 10 years from the date of trial of the crimes of murder (two convictions), bank robbery, attempted prison escape and criminal conspiracy. In so doing the trial judge relied on Rule 609(a) of the Federal Rules of Evidence which he held to require the admission on the issue of credibility of evidence of convictions of felonies (crimes punishable by death or imprisonment in excess of one year) suffered by the witness within 10 years prior to trial. The trial judge held that the only

exception to the mandatory nature of the rule, the balancing or weighing test which it contains, relates only to evidence which might be prejudicial to the defendant and therefore did not apply to evidence of prior crimes by a plaintiff witness. Moreover, the trial judge held that Rule 403 of the Federal Rules of Evidence, which permits the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, was not applicable since it was not designed to override specific rules, such as Rule 609, but rather to provide a guide for handling situations for which no specific rules have been formulated. Finally, the trial judge stated at trial and reiterated in the opinion of the district court denying a new trial that he would have admitted the evidence, even if possessed of the discretion to exclude it, because of its relevance to credibility, which was very important in the case, and because of the lesser prejudice to the plaintiffs arising from the fact that the jury knew they were incarcerated.

The appellant argues that the district court erred in construing Rule 609(a) as mandatorily requiring the admission of evidence of his prior felony convictions. We proceed, therefore, to consider the legislative history of Rule 609(a) in order to determine its nature, and intended effect. Rule 609(a) as was enacted by the Congress[1] is as follows:

> Rule 609. Impeachment by Evidence of Conviction of Crime
>
> (a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in

1. Act of Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1935.

> excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

The rule was the result of a long process of formulation. As originally drafted by the Advisory Committee on Rules of Evidence of the Judicial Conference of the United States, it provided:

> For the purpose of attacking the credibility of a witness evidence that he has been convicted of a crime is admissible, but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted [commonly referred to as felonies] or (2) involved dishonesty or false statement regardless of the punishment [commonly referred to as crimen falsi].[2]

The Advisory Committee noted that the rule had been drawn in accordance with the congressional policy embodied in the congressional amendment of § 14-305 of the District of Columbia Code made by the Act of July 29, 1970, P.L. 91-358, 84 Stat. 473. That act had followed the weight of traditional authority which allowed the use of felonies generally without regard to the nature of the particular offense and of crimen falsi without regard to the grade of the offense. It is thus quite clear that Rule 609(a) as originally formulated, adopted by the Supreme Court and submitted to the Congress was fully mandatory and left no area of discretion to the trial judge.

In the Congress diverging views developed. There were three schools of thought. (1) That evidence of all

2. H.Doc. 46, 93d Cong., 1st Sess. (1973).

felonies and crimen falsi should be admitted without any weighing procedure. This was what had recently been enacted by the Congress for the District of Columbia. It represented the plan embodied in the rule as submitted to the Congress by the Supreme Court and it was urged in the House by Representative Hogan[3] and in the Senate by Senator McClellan.[4] (2) That evidence of crimen falsi should be freely admissible but that the weighing procedure should be applied in the case of felonies other than crimen falsi. This point of view was advanced by Representative Smith in the House.[5] It was adopted by the House subcommittee[6] but rejected by the House Judiciary Committee[6] and the House.[7] (3) That evidence of crimen falsi alone should be admissible. This view was advanced by Representative Dennis[8] and the House Judiciary Committee[8] and was the version adopted by the House which voted down positions (1) and (2).[7]

When the rule came to the Senate, the Judiciary Committee proposed a compromise.[9] With respect to defendants, only convictions of crimen falsi might be used. With respect to other witnesses, convictions of felonies might also be used subject to the balancing test. On the floor of the Senate Senator McClellan offered an amendment[4] providing for admission of all felonies and crimen falsi with no balancing test. In effect, the version originally prepared by the Advisory Committee and forwarded by the Supreme Court.

3. 120 Cong. Rec. 2375.
4. 120 Cong. Rec. 37075.
5. 120 Cong. Rec. 2377.
6. House Rep. 93-650.
7. 120 Cong. Rec. 2381.
8. 120 Cong. Rec. 2377.
9. Sen. Rep. 93-1277.

Senator McClellan's amendment was adopted by the Senate.[10] Thus, the Conference Committee of the two houses was presented with a House draft permitting only crimen falsi to be admitted and a Senate draft which made all felonies freely admissible in addition to crimen falsi.

The present form of Rule 609(a) is the compromise between the two houses proposed by the Conference Committee. Its effect was to accept the McClellan amendment which the Senate had adopted, with the modification that the weighing test be applied to the admission of felonies but only with respect to the "prejudicial effect to the defendant". In their report the conferees on the part of the House stated:

> With regard to the discretionary standard established by paragraph (1) of rule 609(a), the Conference determined that the prejudicial effect to be weighed against the probative value of the conviction is specifically the prejudicial effect *to the defendant*. The danger of prejudice to a witness other than the defendant (such as injury to the witness' reputation in his community) was considered and rejected by the Conference as an element to be weighed in determining admissibility. It was the judgment of the Conference that the danger of prejudice to a nondefendant witness is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible. Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record.[11]

10. 120 Cong. Rec. 37083.
11. House Rep. 93-1597.

From the report it seems clear that it was the defendant in a criminal case the conferees had particularly in mind as to the balancing test. Both houses adopted the Conference Report[12] and the language it proposed is now the rule. Thus, the version of Rule 609(a) which finally passed and is now the law was substantially the same as the draft originally submitted by the Advisory Committee with the sole exception of the weighing clause with respect to possible prejudice to the defendant. In all other respects the final rule, just as the original draft, made all convictions of a witness for felonies and crimen falsi freely admissible.

As we have seen, the congressional attention seems to have been focused largely on criminal cases and the defendant in those cases. But the original rule drawn by the Advisory Committee and submitted by the Supreme Court had no such limitation. Its broad language applied to all cases, criminal and civil, in which witnesses testified in federal courts. And the legislative history makes it clear that the members of Congress recognized this. Thus, Representative Dennis in floor debate in the House on February 6, 1974 stated that the rule applies not only to a man who is a defendant in a criminal case but also to any witness.[13] And later in the debate Representative Hogan pointed out that the rule "applies in civil cases as well as criminal cases to all witnesses."[14] Representative Wiggins urged those who would be on the conference committee "to consider separating out the criminal problem from the civil problem and the nonparty witness situation from the case where the party is a witness,"[15] but this was never done. Also in

12. 120 Cong. Rec. 40070, 40897.
13. 120 Cong. Rec. 2377.
14. 120 Cong. Rec. 2379.
15. 120 Cong. Rec. 2379.

the same debate Representative Lott stated, "I think it is essential to recognize that this is a rule that would have application in both civil and criminal cases."[16] We find no suggestion in the legislative history by anyone that Rule 609(a) did not apply to civil cases and we think its general language compels the conclusion that it does apply to a civil case such as the one now before us.

The appellant urges that, nonetheless, Rule 403 of the Federal Rules of Evidence applies and authorizes the trial judge to weigh the danger of unfair prejudice to any witness against the probative value of evidence of prior felony convictions of the witness and that the trial judge erred in suggesting that, if he had that discretion, he would have exercised it in favor of admissibility. We, therefore, turn to consider the question and effect of Rule 403.

Rule 403 provides:

> Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time
>
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.[17]

In *United States v. Wong*, 703 F.2d 65 (3d Cir. 1983), this court held that Rule 403 did not modify Rule 609(a) insofar as the latter required the admission of prior convictions of crimen falsi of a defendant who testified in his criminal trial. As to this we said (703 F.2d 67):

16. 120 Cong. Rec. 2381.
17. Act of Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1932.

> As the First Circuit has recently noted, Rule 403 was not designed to override more specific rules; rather it was "designed as a guide for the handling of situations for which no specific rules have been formulated." *United States v. Kiendra*, 663 F.2d 349, 354 (1st Cir. 1981) (quoting Fed.R.Evid. 403 advisory committee note). Rule 609(a) is such a specific rule. It was the product of extensive Congressional attention and considerable legislative compromise, clearly reflecting a decision that judges were to have no discretion to exclude *crimen falsi*. *Id.* at 355.

Wong involved a criminal case and evidence of convictions of crimen falsi while the present case is civil and involves evidence of convictions of felonies which were not crimen falsi. Thus, *Wong* is not direct authority here. But we think its rationale is equally applicable here. Rule 609 in mandatory terms requires the admission on the issue of credibility of evidence of prior convictions of felonies suffered within 10 years unless they might prejudicially affect the defendant, in which case their probative value is to be weighed against that prejudicial effect. This language was thoroughly threshed out in the Congress and we are satisfied that it was the congressional intent that except in cases of possible prejudice to the defendant judges were to have no more discretion in admitting evidence of felony convictions than evidence of crimen falsi and that no distinction in this regard could be made between civil and criminal cases. In *United States v. Nevitt*, 563 F.2d 406, 408-9 (9th Cir. 1977), *cert. denied*, 444 U.S. 847 (1979); *United States v. Martin*, 562 F.2d 673, 680 n. 16 (D.C. Cir. 1977); and *United States v. Dixon*, 547 F.2d 1079, 1083 (9th Cir. 1976), all criminal cases, the courts upheld the mandatory admissibility against prosecution

witnesses (in the *Dixon* case a government informer called by the defense) of felony convictions which were not crimen falsi. Their rationale applies equally to the treatment under Rule 609(a) of plaintiff's witnesses in a civil case.

In *Furtado v. Bishop*, 604 F.2d 80 (1st Cir. 1979), *cert. denied*, 444 U.S. 1039 (1980), the court was presented with the issue whether Rule 403 operated to modify the mandatory provisions of Rule 609(a) but decided that it need not resolve that issue. In *Czajka v. Hickman*, 703 F.2d 317 (8th Cir. 1983), and *Shows v. M/V Red Eagle*, 695 F.2d 114 (5th Cir. 1983), both civil cases, the courts, without considering the legislative history, decided, we think wrongly, that Rule 403 did operate to modify Rule 609(a). For the reasons already stated we decline to follow those cases. We accordingly hold that the district court in the present case rightly decided that Rule 609(a) compelled the admission of evidence of Diggs' prior convictions and that Rule 403 did not give discretionary authority to exclude them as prejudicial to the witness. We, therefore, have no need to consider the trial judge's suggestion that he would have admitted them in any event in the exercise of his discretion if he had been given such discretion.

One further thing needs to be said. As the legislative history discloses, the scope of Rule 609 has been and is the subject of widespread controversy and strongly held divergent views. We have felt compelled to give the rule the effect which the plain meaning of its language and the legislative history require. We recognize that the mandatory admission of all felony convictions on the issue of credibility may in some cases produce unjust and even bizarre results. Evidence that a witness has in the past been convicted of manslaughter by automobile, for example, can have but little relevance to his credibility as a witness in a totally different matter. But if the rule is to be amended

to eliminate these possibilities of injustice. It must be done by those who have the authority to amend the rules, the Supreme Court and the Congress. We, therefore, leave the problem to them. It is not for us as enforcers of the rule to amend it under the guise of construing it.

The judgment of the district court will be affirmed.

GIBBONS, *Circuit Judge*, dissenting:

The majority notes, correctly, that *United States v. Wong*, 703 F.2d 65 (3d Cir. 1983) (per curiam), is not dispositive of this appeal since there the court applied Fed. R. Evid. 609(a)(2) to admit evidence of prior *crimen falsi* convictions in a subsequent criminal case. In contrast, this case is a civil action involving the question of the admissibility of prior felony convictions under Rule 609(a)(1).

Rule 609(a) states:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Other courts of appeal have reviewed Rule 609 and concluded that the mandatory admission feature of prior *crimen falsi* convictions does not apply to the admissibility of prior felony convictions in civil cases. *See Czajka v. Hickman*, 703 F.2d 317, 318 (8th Cir. 1983) ("Rule 403 . . . must be applied in civil cases when a party seeks to cross-examine another about criminal convictions."); *Shows v. M/V Red Eagle*, 695 F.2d 114, 118-19 (5th Cir. 1983) (civil case wherein Rule 403 modified Rule 609). *Cf. Furtado v. Bishop*, 604 F.2d 80, 93 (1st Cir. 1979), *cert. denied*, 444 U.S. 1039 (1980) (court declined to resolve application of Fed. R. Evid. 403). The majority opinion creates a split among circuits by holding, for the first time, that in civil cases admission of prior felony convictions for the impeachment of any witness is mandatory. That result, placing use of such evidence outside the reach of the district court's discretion under Fed. R. Evid. 403, makes no sense whatever, for it mandates admission of such evidence against totally disinterested witnesses testifying, for example, about whether a light at an intersection was red or green.

The snippets of legislative history in which four Members of Congress anticipated that some court might reach so ridiculous a result, 120 Cong. Rec. 2377, 2379, 2381, do not persuade me that the result was intended by Congress. The overwhelming weight of the legislative background material on Rule 609 suggests a preoccupation by Senator McClellan and others with defendants in criminal proceedings. The result was, in my view, a legislative oversight as to the legislation's effect upon civil plaintiffs. By the time the oversight was recognized by Congressmen Dennis, Hogan, Wiggins and Lott legislative fatigue had set in, and the resulting ambiguity in Rules 403 and 609(a) was left unresolved.

Those courts which have considered whether Rule 609(a) evidence is, in civil cases, within the reach of the trial court's discretion under Rule 403 have taken the sensible approach of construing the rules reasonably, consistent with the "law and order" concerns of the proponents of extensive use of other

crimes evidence. Nor did those courts, by eliminating the possibility of the patent injustices which can result from extending the mandatory application of Rule 609(a) to civil cases, invade the province of Congress. No matter which way these ambiguous rules are interpreted, Congress is free to change the interpretation by legislation. The realities of the legislative process are such, however, that congressional action will not be soon forthcoming, if at all. Meanwhile, in those circuits which have interpreted the two rules so as to achieve a reasonable accommodation in civil cases, that reasonable accommodation will stand. In this circuit, on the other hand, concededly bizarre results will be mandated by our rigid application of Rule 609(a) in civil cases which were not of real concern to Congress. Accordingly, I dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES DIGGS, et al. : CIVIL ACTION

v. :

EDMOND LYONS, et al. : NO. 80-1140

MEMORANDUM

BRODERICK, J. October 13, 1983.

In this action brought pursuant to 42 U.S.C. § 1983 the plaintiffs, Charles Diggs, William Stovall, Marvon Merritt, and Leroy Edney, alleged that numerous officials and correctional officers of the Holmesburg prison used excessive force in apprehending them following an attempted escape, thereby violating their rights under the Eighth and Fourteenth Amendments, and denied them access to legal assistance, in violation of their Sixth Amendment rights. At the close of the plaintiffs' case, the Court directed a verdict in favor of all defendants on the Sixth Amendment claims and directed a verdict in favor of defendants Edmund Lyons, David Owens, John Daughn, and Officer Bozack on the Eighth and Fourteenth Amendment claims. The Court also denied a motion by the plaintiffs for a directed verdict in their favor against the remaining defendants on the excessive force claims. The jury returned a verdict in favor of these remaining defendants, Walter Dunlevey, Myron Wiley, Eugene Marlowe, Charles Upshur, Jose Vasquez, and Robert Widdop on the excessive force claims.

ENTERED: 10-14-83

CLERK OF COURT

Plaintiffs Diggs, Stovall and Edney[1] have now moved for judgment notwithstanding the verdict or, in the alternative, for a new trial, contending that the evidence cannot rationally support the jury's finding against the plaintiffs and that the Court erred in admitting evidence of the plaintiffs' prior convictions for impeachment purposes and in certain of its instructions to the jury. For the reasons which follow, the plaintiffs' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial will be denied.

> Motions for a new trial require the exercise of discretion by the Court, whose "duty is essentially to see that there is no miscarriage of justice." 6A Moore's Federal Practice ¶ 59.08[5], at 59-160 (footnote omitted) (2d ed. 1974); Thomas v. E. J. Korvette, Inc., 476 F.2d 471, 474-75 (3d Cir. 1973). The jury's verdict may be set aside only if manifest injustice will result if it were allowed to stand. The Court may not substitute its own judgment for that of the jury merely because the Court may have reached a different conclusion. To grant a motion for judgment n.o.v., the Court must find as a matter of law that the plaintiff failed to adduce sufficient facts to justify the verdict. Neville Chemical Co. v. Union Carbide Corp., 422 F.2d 1205, 1210 (3d Cir.), cert. denied, 400 U.S. 826, 91 S.Ct. 51, 27 L.Ed.2d 55 (1970). Such a motion "may be granted only when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment." 5A Moore's, supra, ¶ 50.07[2], at 50-77 (footnote omitted); Korvette, supra, at 474.

Douglas W. Randall, Inc. v. AFA Protective Systems, Inc., 516 F. Supp. 1122, 1124 (E.D. Pa. 1981), aff'd 688 F.2d 820 (3d Cir. 1982. In the present case, the evidence was more than sufficient,

1. The Court has been advised that plaintiff Merritt wishes to withdraw his motion.

viewed in the light most favorable to the defendants, to support the jury's verdict in the defendants' favor. The defendants testified that they apprehended the plaintiffs quickly and with minimal use of force; this testimony was corroborated by medical evidence which showed that the plaintiffs sustained at most minimal injuries. The plaintiffs contend that their testimony shows that excessive force was used. The jury, however, was free to accept or reject this testimony. The Court may not make its own determination of credibility and overturn the jury's findings against the plaintiffs by entering judgment in the plaintiffs' favor. Furthermore, since the verdict is not against the weight of the evidence, the Court would not be justified in ordering a new trial on the ground that the result was manifestly unjust.

The plaintiffs also claim that certain errors at trial require a retrial. The most substantial of these claims is that evidence of the plaintiffs' prior convictions should have been excluded as unduly prejudicial pursuant to Rule 403, as requested by the plaintiffs in a motion in limine. At trial, the Court denied this motion, which was opposed by the defendant, stating as follows:[2]

> I just want to point out on the record that the plaintiffs, as you know, filed a motion in limine asking the Court to prevent the defendants, their witnesses and attorney from referring to or mentioning the plaintiffs' criminal records, convictions or arrests at the trial of this matter.

2. The transcript has been edited slightly.

First of all, I want to make it clear that the ruling that I made yesterday does not include arrests. We are only talking about convictions or records. And plaintiffs claim that admission of this evidence would be prejudicial to their case and this prejudice outweighs the probative value of the evidence. And you base this claim on interpretation of Rule 609 and also 403 as requiring the exclusion of that evidence. Now, the motion was opposed, and the defendants contended that admission of prior felony convictions of the plaintiffs is required by Rule 609, and I have determined to deny the plaintiffs' motions since the Court believes it's without discretion to exclude prior felony convictions of the plaintiffs in this case. Now, admission of this evidence, however, will be subject to the time requirement in Rule 609(b), and I'm talking about the ten-year time requirement, and I'm interpreting that ten-year period as from the time of trial.

Now, 609(a) provides that "the evidence of a witness' conviction of a crime shall be admitted" -- it uses the word "shall" -- "if the crime was punishable by death or imprisonment in excess of one year and the Court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant." And I emphasize "to the defendant", which is in the rule. Then it goes on to say: "Or if the crime involved dishonesty or false statement." And I have interpreted that as meaning that the balancing test is limited to determining the prejudicial effect to "the defendant" in a criminal case. And it therefore appears under 609(a) all prior felony convictions of witnesses are admissible subject to 609(b) so long as there's no danger of prejudice to a criminal defendant. In this case, we have a civil case, and although they may have at one time been criminal defendants, they are now civil plaintiffs.

And incidentally, this conclusion has been reached by two circuit courts of appeal which have considered the issue and which have ruled that a district court is without discretion to exclude prior felony convictions of a prosecution witness. I don't hesitate to tell you

that when we had our conference, I was unaware that these courts said it was not a balancing test that I had to do, and I was prepared and I indicated to you, that although I wasn't making a definitive ruling at that time, I probably would use the balancing test. Now, I'm referring to United States v. Nevitt, which is 563 Fed. 2d 406, 1977, and that's the 9th Circuit [cert. denied 444 U.S. 847 (1979)], and I'm also referring to the D.C. Circuit case of United States v. Martin, which is 562 Fed. 2d 673 (1977). This Court wants to point out that the 9th Circuit case, U.S. v. Nevitt, was cited with apparent approval by Judge Sloviter in speaking for a panel on the Third Circuit recently, in 1980, in the Government of the Virgin Islands v. Carino; that citation is 631 Fed. 2d [226]. We note that Judge Rambo, in the Middle District -- and incidentally, this is the case that defense counsel called our attention to, and the name of that case is Garnett v. Kepner, 541 F. Supp. 241, decided in 1982 -- held that exclusion of a section 1983 plaintiff's prior convictions was error. And by the way, Judge Rambo in that case found that she herself had committed the error and granted a new trial, and that's giving yourself a dose of your own medicine, as they say.

Now, in all of the cases which discuss this problem, these courts have relied on the legislative history which shows that Congress intended evidence of prior convictions to be excluded only when it posed a danger of great prejudice to the criminal defendant. The plaintiffs cited the 5th Circuit case of Shows v. Red Eagle, which is 695 Fed. 2d 114, a 1983 case, which held that evidence of a civil plaintiff's prior conviction for armed robbery was excludable under 403 and left open the question whether it was excludable under Rule 609. With deference, this Court believes that since Congress has spoken so clearly on this point in Rule 609 the standards of 403 should not be used to come to a conclusion different from that Congress apparently intended.

In any case, even if this Court were to find it did have discretion in this case, the strong policy for admission of this evidence

> that's expressed in 609, its relevance to the credibility of witnesses as well as to the circumstances of their escape, and the lesser degree of prejudice arising from the fact that the jury will already know that these plaintiffs are incarcerated, would lead the Court to admit the evidence.

(N.T. 53-57).

The plaintiffs continue to except to this ruling, and point out that the case upon which they relied at trial, Shows v. Red Eagle, has been followed by the Eighth Circuit in Czajka v. Hickman, 703 F.2d 317 (1983). The Czajka case, like the present one, was brought pursuant to § 1983. Again with deference, this Court continues to believe that the better view concerning its discretion under Rule 609(a)(1) is expressed by the cases upon which the Court relied at trial, which took account of the language and legislative history of Rule 609, rather than by the Shows and Czajka cases, which make no reference to the legislative history of the Rule. In addition, the rationale of the Shows and Czajka cases, that Rule 403 "is a rule of exclusion which cuts across the rules of evidence," 695 F.2d at 118, 703 F.2d at 319, and may be applied even in the face of contrary congressional intent, has been rejected by the Third Circuit in a recent discussion of Rule 609(a)(2). United States v. Wong, 703 F.2d 65 (1983). In Wong, the Third Circuit stated:

> Wong suggests that the apparently mandatory admission of crimen falsi under Fed. R.Evid. 609(a)(2) is qualified by the general balancing test of Fed.R.Evid. 403. . . .
>
> We disagree. As the First Circuit has recently noted, Rule 403 was not designed to override more specific rules; rather it was

> "designed as a guide for the handling of situations for which no specific rules have been formulated." United States v. Kiendra, 663 F.2d 349, 354 (1st Cir. 1981) (quoting Fed. R.Evid. 403 advisory committee note). Rule 609(a) is such a specific rule. It was the product of extensive Congressional attention and considerable legislative compromise, clearly reflecting a decision that judges were to have no discretion to exclude crimen falsi. Id. at 355.

703 F.2d at 67 (footnote omitted).

Just as Congress came to the decision in Rule 609(a)(2) that judges were to have no discretion to exclude crimen falsi, in Rule 609(a)(1) Congress clearly expressed its intent that only prejudice to a criminal defendant could be considered in excluding evidence of felonies. As stated in the Conference Committee Report on Rule 609(a):

> With regard to the discretionary standard established by paragraph (1) of rule 609(a), the Conference determined that the prejudicial effect to be weighed against the probative value of the conviction is specifically the prejudicial effect to the defendant. The danger of prejudice to a witness other than the defendant (such as injury to the witness' reputation in his community) was considered and rejected by the Conference as an element to be weighed in determining admissibility. It was the judgment of the Conference that the danger of prejudice to a nondefendant witness is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible. Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record.

Conf. Rep. No. 1597, 93d Cong., 2d Sess. 9, reprinted in 1974 U.S. Code Cong. & Ad. News 7098, 7103 (emphasis in original).

Wong also appears inconsistent with the rationale of Tussel v. Witco Chemical Corp., 555 F. Supp. 979 (W.D. Pa. 1983), which excluded evidence of a civil plaintiff's prior drug conviction on the basis of Rules 102, 403, and 611 of the Federal Rules of Evidence.

Finally, the Court reiterates its view, expressed at trial, that it would have admitted evidence of the plaintiffs' prior convictions, even if possessed of the discretion to exclude such evidence, because of its relevance to credibility, which was very important in this case, and because of the lesser prejudice to the plaintiffs arising from the fact that the jury knew they were incarcerated. As the efforts of courts attempting to find a rationale for excluding evidence of prior felony convictions reflect, a rigid application of Rule 609(a)(1) may, in some cases, lead to injustice. This was not, however, such a case.

The plaintiffs also contend that the Court erred in instructing the jury on the good faith defense, because there was not sufficient evidence to support a finding that the defendants acted in good faith, and in its instruction on permissible use of force in preventing escape from a correctional institution. Since both Warden Daughn and Sergeant Dunlevey testified as to the procedures which correctional officers should follow during an attempted escape, and since all six officers testified as to their actions during the escape, there was evidence from which the jury could have found that the defendants' actions were taken in good faith.

The challenged instruction on use of force reads:

> Now, I must also instruct you that under the law of Pennsylvania, a guard or a police officer is justified in the use of force including even deadly force, under some circumstances which he, that is, the officer believes to be reasonably necessary to prevent the escape from a correctional institution of a person whom the officer believes to be lawfully detained in such institution under sentence for an offense or awaiting trial for an offense. Now, the belief of the officer must be reasonable.

(N.T. 411-12). This instruction was in accordance with the law and could not have prejudiced the plaintiffs. 18 Pa.C.S.A. § 508 (c)(2); See Phillips v. Ward, 415 F. Supp. 976 (E.D. Pa. 1976), appeal dismissed 575 F.2d 72 (3d Cir. 1978) (belief must be reasonable). As stated above, there was ample evidence from which the jury could have concluded that reasonable force was used in apprehending the plaintiffs following the escape attempt.

For the above reasons, the motion of the plaintiffs for judgment notwithstanding the verdict or for a new trial will be denied. An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES DIGGS, et al.	:	CIVIL ACTION
v.	:	
EDMOND LYONS, et al.	:	NO. 80-1140

ORDER

AND NOW, this 13th day of October, 1983, upon consideration of the plaintiffs' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, for the reasons stated in this Court's Memorandum of October 13th, 1983,

IT IS HEREBY ORDERED:

1. The motion of plaintiffs Charles Diggs, William Stovall, and Leroy Edney for judgment notwithstanding the verdict or, in the alternative, for a new trial is DENIED.

2. The motion of the plaintiff Marvon Merritt for judgment notwithstanding the verdict or, in the alternative, for a new trial is marked WITHDRAWN.

RAYMOND J. BRODERICK, J.

CERTIFICATE OF SERVICE

David Kairys hereby certifies that he has served a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit and accompanying materials on counsel for all parties by first class mail or hand delivery this date.

David Kairys

Dated: November 27, 1984

OPPOSITION BRIEF

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

NO. 84-5814

CHARLES DIGGS,
Petitioner

VS.

EDMOND LYONS, et al,
Respondents

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For
The Third Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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IN THE
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NO. 84-5814

CHARLES DIGGS,
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VS.

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On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For
The Third Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether the court of appeals erred in upholding the district court's ruling that evidence of plaintiff's prior felony convictions was automatically admissible for purposes of impeachment under Fed. R. Evid. 609(a)(1).

STATEMENT OF THE CASE

This action was initiated by Charles Diggs, a state prison inmate, against numerous Philadelphia County officials and correctional officers, alleging the use of excessive force in apprehending Diggs and three fellow inmates following their attempted escape from Holmesburg Prison. Prior to trial, plaintiffs submitted a motion in limine by which they requested the exclusion of evidence of Diggs's prior felony convictions. The court denied Diggs's motion, ruling that under Fed.R.Evid. 609(a)(1) it possessed no discretion to exclude evidence of prior felony convictions where such evidence is properly elicited from the witness or established by public record on cross-examination and the witness is not a criminal defendant.

At trial, plaintiffs' counsel inquired into the reason for Diggs's incarceration. Counsel for defendants then established through cross-examination that in the ten-year period preceding trial Diggs had been convicted of attempted escape, criminal conspiracy, first degree murder, second degree murder and bank robbery. Both in post-trial motions and on appeal to the United States Court of Appeals for the Third Circuit, Diggs challenged the trial court's ruling that evidence of his prior felony convictions was automatically admissible for purposes of impeachment under Fed. R. Evid. 609(a)(1). In an opinion authored by Senior Circuit Judge Albert B. Maris, former chairman of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States,[1] the

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1 The Standing Committee, to which the Advisory Committee on Rules of Evidence reported, circulated the three Advisory Committee drafts of Rule 609 which were considered for submission to Congress.

court of appeals upheld the lower court's application of Rule 609(a)(1) and echoed its understanding of the congressional intent behind the rule. Upon petition for rehearing in banc, a majority of the circuit judges of the circuit voted against rehearing on August 30, 1984. Diggs's petition for writ of certiorari followed.

ARGUMENT

1. Petitioner Diggs challenges the circuit court's analysis in Diggs v. Lyons, 741 F.2d 577 (3d Cir. 1984), of the legislative history of Fed. R. Evid. 609. The court of appeals ruled in Diggs that the "general language" and the legislative history of the rule compel the conclusion that the prior felony convictions of all witnesses in civil trials are automatically admissible for purposes of impeachment, Id. at 581, and that "judges [are] to have no more discretion in admitting evidence of felony convictions than evidence of crimen falsi..." Id. at 582. The court further determined that the Rule 609(a)(1) balancing test -- which requires the trial court to weigh the probative value of such evidence against "its prejudicial effect to the defendant" -- represents a special exception carved out from the general policy of automatic admissibility and designed to protect the criminal defendant when he takes the stand. Id. at 580. The court of appeals concluded that as to all other witnesses in civil and criminal trials, Rule 609(a) as originally formulated by the Advisory Committee on Rules of Evidence, adopted by this Court, submitted to Congress, reformulated in the House of Representatives, the Senate and the Conference Committee, and finally adopted by Congress, was fully mandatory and left no area of discre-

tion to the trial judge. Id. at 579-582.

Diggs's principal complaint here is that the decision of the court of appeals "conflicts with decisions of the Fifth and Eighth Circuits." (Pet. 4.) This assertion, however, amounts to a mere half-truth. While it is true that those circuits have held that the prior felony convictions of witnesses in civil trials are subject to the Rule 403 balancing test, those courts have never reached the dispositive issue in this case: whether Congress intended Rule 609(a)(1) to apply to civil cases as well as criminal cases. Indeed, when confronted with that question, those courts on three separate occasions specifically declined to inquire into the congressional intent behind the rule. Shows v. M/V Red Eagle, 695 F.2d 114, 119 (5th Cir. 1983) ("We need not resolve this issue here..."); Czajka v. Hickman, 703 F.2d 317, 319 (8th Cir. 1983) ("We need not resolve this issue..."); Radtke v. Cessna Aircraft Co., 707 F.2d 999, 1000 (8th Cir. 1983) ("we have recently declined to resolve that issue...")[2]

In contrast to the approach taken by the Fifth and Eighth Circuits, the court below meticulously outlined the history of Rule 609's formulation, recalling the language of its many drafts and the

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2 The courts bypassed the operation of Rule 609 altogether, reasoning that "Rule 609 does not foreclose the district court's duty under Fed. R. Evid. 403 to weigh the probative value of the evidence against the danger of unfair prejudice." Czajka, 703 F.2d at 319, citing, Shows, 695 F.2d at 118-119. This logic is, of course, ill-conceived since it must first be determined whether Congress intended Rule 609 to apply to civil as well as criminal cases, and if so, to preempt the trial court's discretion where the witness is not the accused, before it can be determined whether the Rule 403 balancing test applies. This preliminary inquiry is necessary because Rule 403 was not designed to override more specific, fully mandatory rules. Adv. Comm. Notes, Fed. R. Evid. 403 (1972); United States v. Wong, 703 F.2d 65, 67 (3d Cir. 1983); United States v. Kiendra, 663 F.2d 349, 354-355 (1st Cir. 1981).

influences which shaped its legislative history. The court's unambiguous conclusion was that Congress, and this Court in its final formulation of the Rule,[3] intended to mandate the automatic admissibility of evidence of prior felony convictions for impeachment purposes in both civil and criminal trials (except where the criminal defendant takes the stand), just as it intended to mandate the automatic admissibility of evidence of crimen falsi in all cases. The court found "no suggestion in the legislative history by anyone that Rule 609(a) did not apply to civil cases ..." Diggs, 741 F.2d at 581. In fact, it is abundantly clear from the content and sequence of remarks made by several congressmen during the floor debate of the House of Representatives that the House was operating with the understanding that Rule 609 applies to both civil and criminal cases.[4] Moreover, the court below found that although the focus during the House and Senate floor debates on Rule 609 was often upon impeachment of the accused, this special attention arose from the concern voiced by many congressmen that the accused deserves extra protection from the effect of this Court's final formulation of the Rule, which was fully mandatory and which drew no distinction between civil and criminal witnesses. Thus, the congressional "preoccupation" with the criminal defendant reflects not "legislative oversight" with respect to the impeachment of witnesses in civil trials, (Pet. 6), but rather legislative foresight: Congress anticipated the danger of prejudice to the accused, which as to all other witnesses was "outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible." Conference Report, H.R. Rep. No. 1597, 93d Cong., 2d Sess., 9-10 (1974).

Neither the Fifth nor the Eighth Circuits has come to grips with the language and legislative history of Rule 609. Indeed, they have avoided the issue entirely. The Third Circuit, however, has squarely addressed this dispositive issue and filled the void left by those courts with a sound and thorough reading of the intent behind Rule 609. Thus, Diggs's assertion that "[e]very other court that has ruled on the issue... -- including two other circuits -- has reached the opposite conclusion from the court of appeals in this case...."[5]

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3 This Court submitted the following version of Rule 609 to Congress:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involved dishonesty or false statement regardless of the punishment.

H. Doc. 46, 93d Cong., 1st Sess. (1973).

4 The pertinent parts of this debate, including the remarks of Reps. Hogan, Dennis, Smith, Brasco, and Wiggins, can be found at 120 Cong. Rec. 2376-2381.

5 Diggs also relies upon Furtado v. Bishop, 604 F.2d 80 (1st Cir. 1979), Moore v. Volkswagenwerk, A.G., 575 F. Supp. 919 (D.C. Md. 1983), and Tussel v. Witco Chemical Corp., 555 F. Supp. 979 (W.D. Pa. 1983), in support of this assertion. In Furtado, the First Circuit decided that it "need not resolve the issue" of whether the Rule 403 balancing test overrides Rule 609(a)(1) because "whatever error there was" in the trial court's exclusion of evidence of the prior felony convictions of certain witnesses was "harmless". Furtado, 604 F.2d at 93. In Moore, the district court for the District of Maryland determined that "[i]n drafting Rule 609(a)(1), Congress was concerned primarily about the criminal defendant," and concluded without further inquiry into the legislative history of the rule that it is "inapplicable" in civil trials. There is no indication that the Fourth Circuit subscribes to this interpretion. Lastly, the conclusion reached in Tussel by the district court for the Western District of Pennsylvania has been effectively overruled by Diggs.

(Pet. 8), relies on a misreading of their decisions: by their own admission, neither of those circuits has "ruled on the issue" presented in Diggs.

Diggs next concocts what he describes as a "literal" reading of Rule 609(a)(1), which would apply a balancing test whenever a party seeks to impeach any defendant, civil or criminal, but which would provide no such protection to all other witnesses. Diggs maintains that the court of appeals has adopted this "literal" reading of Rule 609(a)(1). Nothing could be further from the truth. The court specifically found that "it was the defendant in a criminal case the conferees [of the Conference Committee] had particularly in mind as to the balancing test." Diggs, 741 F.2d at 580 (emphasis added). As to all other witnesses, the Rule mandates the automatic admissibility of prior felony convictions. Diggs's contention that the Rule, as interpreted by the court of appeals, "favor[s] civil defendants over civil plaintiffs," (Pet. 5), is belied by the plain language of the court's opinion.

Next, Diggs urges this Court to rewrite Rule 609, arguing that as presently drafted the Rule is unfair. As the courts below properly recognized, however, the issue of fairness was thoroughly threshed out in Congress, and it is not for our courts to amend under the guise of construction that which was approved by Congress. Therefore, the court "felt compelled to give the rule the effect which the plain meaning of its language and the legislative history require." Diggs, 741 F.2d at 582.

2. In a single page of his Petition, Diggs hastily discusses no fewer than four constitutional issues, not one of which was properly preserved in the courts below: bill of attainder, ex post facto law,

equal protection and due process. Since Diggs has failed to preserve these issues for appellate review he may not raise them for the first time before this Court. DeSylva v. Ballentine, 351 U.S. 570, 582 (1956); Helvering v. Minnesota Tea Co., 296 U.S. 378, 380 (1935). In any case, as Diggs's off-handed presentation of these issues suggests,[6] the constitutional challenges are utterly devoid of legal support.

This Court has defined a bill of attainder as "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." Selective Service System v. Minnesota Public Interest Research Group, _____ U.S. _____, 82 L.Ed.2d 632, 640 (1984). Nixon v. Administrator of General Services, 433 U.S. 425, 468 (1977). Rule 609(a) does not legislatively determine guilt without trial, it does not inflict punishment, and it does not single out "specifically designated persons or groups" for adverse treatment. United States v. Brown, 381 U.S. 437, 447 (1965). The Rule, which applies to all witnesses in all federal cases, simply authorizes the introduction of evidence of certain crimes after conviction and for the limited purpose of impeaching credibility.

To determine whether a statute inflicts impermissible "punishment" for purposes of the bill of attainder clause,[7] this

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6 Perhaps reluctant to be caught in an open misrepresentation, Diggs modestly submits that the Third Circuit's construction of Rule 609(a) "has the disturbing look of a bill of attainder or ex post facto law." (Pet. 10, emphasis added.) Diggs's equal protection and due process analyses are economically consolidated into one sentence and are not supported by a single cited authority. (Id.)

7 Article I, Section 9, clause 3 of the United States Constitution provides: "No bill of attainder or ex post facto law shall be passed."

Court looks to the legislative purposes behind the challenged statute and whether the law imposes disabilities historically associated with legislative punishment. Selective Service System, _____ U.S. _____, 82 L.Ed.2d at 643; Nixon, 433 U.S. at 473. The legislative history reveals that the congressional purpose behind Rule 609(a) was not to punish witnesses, but to ensure that juries are provided the maximum possible evidence bearing on credibility while incorporating special protection for the constitutional rights of criminal defendants. See Diggs, 741 F.2d at 580. The legislative record reveals no punitive legislative intent and the rule effectively furthers proper non-punitive legislative purposes.

The penalties historically identified as "punishment" implicating the bill of attainder clause were death, imprisonment, banishment, and the punitive confiscation of property. Selective Service System, ____ U.S. _____, 82 L.Ed.2d at 643-44. The sanction must at least entail some "affirmative disability or restraint," Flemming v. Nestor, 363 U.S. 603, 617 (1960), such as exclusion from specified employments, Nixon, 433 U.S. at 474. Like the challenged statute in Nestor, which terminated Social Security benefits to past members of the Communist Party, the Rule of Evidence under challenge here imposes no "affirmative disability or restraint" and therefore does not qualify as punishment for purposes of the bill of attainder clause.

An ex post facto law is one which assigns harsher criminal or penal consequences to an act than did the law in place when the act occurred. Weaver v. Graham, 450 U.S. 24, 29 & n. 13 (1981); Beazell v. Ohio, 269 U.S. 167 (1925). Rule 609(a)(1) imposes no criminal or penal consequences at all.[8] It merely authorizes the introduction of evidence of criminal convictions for conduct that was criminal when it was performed. Moreover, to the extent that the Rule mandates automatic admissibility of prior felony convictions, the Rule is simply a codification of the preexisting common law, Diggs, 741 F.2d at 579-80, and thus has no adverse retroactive effect. The only respect in which the Rule alters the common law authority that preceded it is for the benefit of those witnesses facing criminal prosecution. The Rule changes the law in favor of those facing potential conviction by imposing a new restriction on the admissibility of their former felonies. Id. at 580.

Diggs now asserts for the first time in the course of this litigation, and in the space of one sentence with no supporting authority, that Rule 609(a)(1) violates equal protection and due process because it treats different classes of witnesses differently. (Pet. 10.)[9] In alleging that the classification drawn between criminal defendants and all other witnesses is devoid of any rational basis, (Pet. 10), Diggs apparently concedes, as he must, that Rule

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[8] See Harisiades v. Shaughnessy, 342 U.S. 580 (1952), in which this Court rejected an ex post facto challenge to a federal statute that retroactively made past membership in certain organizations a basis for the deportation of aliens. The Harisiades Court held that the law was not subject to the ex post facto prohibition because deportation is a civil rather than a criminal sanction.

[9] Although the fifth amendment contains no equal protection clause, it does forbid federal statutory discrimination that is "so unjustifiable as to be violative of due process." United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 179 n.8 (1980) (citation omitted). Thus, if a federal statute is valid under the implied equal protection component of the fifth amendment, it is a fortiori valid under the due process clause of that amendment. Id.

609(a)(1) is reviewable under the most lenient standard of constitutional review.[10] Since the Rule does not burden fundamental constitutional rights or rely on "suspect" classifications, such as race or national origin, it must be sustained under the fifth amendment so long as the congressional line-drawing has some "reasonable basis" and is not "patently arbitrary or irrational." United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 175, 177 (1980). Criminal defendants are unique among witnesses in that they risk a loss of liberty and even life itself as a consequence of the judicial proceeding; the basis for restricting the admission of adverse evidence against them, even if relevant, is strong indeed. Congress was not obligated to erect the same obstacle to the admission of relevant evidence in cases where concern for loss life or liberty is not a factor. As this Court pointed out in Reed v. Reed, 404 U.S. 71, 75 (1971), equal protection does not preclude legislatures from treating different classes of persons in different ways. Since the special treatment for criminal defendants is rationally based on actual differences in their status, Diggs's constitutional challenge must fail.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

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[10] Diggs mischaracterizes the distinction drawn by Rule 609(a)(1) as one between all plaintiffs and all defendants. Pet. 10. In fact, as the Third Circuit's opinion makes clear, the relevant distinction in Rule 609(a)(1) is between criminal defendants (who are accorded special protection against adverse though relevant evidence) and all other witnesses. Diggs, 741 F.2d at 580.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, BARBARA R. AXELROD, hereby certify that I have served a copy of the foregoing Brief for the Respondents in Opposition on the following individual by First Class U. S. Mail on March 14, 1985:

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OPINION

SUPREME COURT OF THE UNITED STATES

CHARLES DIGGS *v.* EDMOND LYONS, SUPERINTENDENT, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-5814. Decided April 29, 1985

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Petitioner sued respondent prison officials in Federal District Court under 42 U. S. C. § 1983, alleging the use of excessive force in preventing his escape from Holmesburg county prison in Philadelphia and the denial of access to legal assistance. Respondents prevailed on both claims. At trial, the District Court permitted respondents' counsel to prove that petitioner had been convicted of murder, bank robbery, attempted prison escape, and criminal conspiracy within the 10 years preceding the date of trial. In so doing the trial judge relied on Rule 609(a) of the Federal Rules of Evidence, which provides that evidence of such felony convictions "shall be admitted" to attack the credibility "of a witness," if "the probative value of admitting this evidence outweighs its prejudicial effect to the defendant."[1] The trial

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[1] Rule 609(a) provides:

"(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment."

Rule 609(b) limits application of the rule to convictions that are more than 10 years old.

judge interpreted the rule to require the evidence to be admitted since the Rule's provision for assessing the prejudicial import of the evidence applied only in regard to the *defendant*, not to a plaintiff witness against whom such evidence was sought to be introduced. Moreover, under the trial judge's view, Rule 609(a) precluded any resort to the balancing test of Rule 403 of the Federal Rules of Evidence, which permits the exclusion of relevant evidence if its probative value is "substantially outweighed by the danger of unfair prejudice."[1]

A divided panel of the Court of Appeals for the Third Circuit affirmed on appeal. 741 F. 2d 577. The Court of Appeals found the District Court's interpretation of Rule 609(a) to be strongly supported by the Rule's legislative history. Although acknowledging that congressional attention in enacting the Rule had been focused largely on criminal cases and on the defendants in those cases, the Court of Appeals concluded that its broad language was nevertheless applicable to a civil case such as the one before it. And, like the District Court, the Court of Appeals held that Rule 403 had no application where, as here, a more specific rule of admissibility applied. Admission of prior convictions to impeach a plaintiff witness in a civil case was therefore mandatory. The Court of Appeals recognized that this reading of the Rule "may in some cases produce unjust and even bizarre results," but suggested that the remedy lay with "those who have the authority to amend the rules, the Supreme Court and the Congress." *Id.*, at 582.[2]

[1] Rule 403 provides:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[2] The District Court stated that it would have admitted the evidence of the prior convictions even if it had been given the discretion to exclude it under a balancing test. The Court of Appeals evidently viewed this statement as dictum. After squarely affirming the District Court's holding that "Rule 609(a) compelled the admission of evidence of [petitioner's] prior convictions and that Rule 403 did not give discretionary authority to exclude them as prejudicial to the witness," the Court of Appeals noted that it therefore had "no need to consider the trial judge's suggestion that he would have admitted them in any event in the exercise of his discretion if he had been give such discretion." 741 F. 2d, at 581. In any event, that the District Judge would have reached the same result under a different test is no reason for this Court to decline to review this case. The Court of Appeals' interpretation of Rule 609(a) as precluding application of the Rule 403 balancing test is now the law in the Third Circuit, and future cases in that circuit will be governed by it.

As the Court of Appeals recognized, its reading of Rule 609(a) directly conflicts with the interpretation of two other circuits. Both the Eighth Circuit and the Fifth Circuit have ruled that, assuming the applicability of Rule 609(a) to civil cases, it does not relieve courts of the duty to assess the prejudicial effect of evidence of prior convictions against a plaintiff witness under Rule 403. See *Czajka* v. *Hickman*, 703 F. 2d 317 (CA8 1983); *Shows* v. *M/V Red Eagle*, 695 F. 2d 114 (CA5 1983). This disagreement concerning the Rule's meaning now affects litigants in three large circuits, and the issue will undoubtedly arise elsewhere before long. See *Furtado* v. *Bishop*, 604 F. 2d 80 (CA1 1979), cert. denied, 444 U. S. 1039 (1980) (finding it unnecessary to resolve the question). Given this square conflict regarding a fundamental evidentiary rule, and in light of the concededly "bizarre" results that may follow from the ruling below, I would grant certiorari to decide whether Rule 609(a) mandates the admission of evidence of prior convictions against a plaintiff witness in a civil case.